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In the Supreme Court of the United States

Original Proceeding No. 9
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EX PARTE ABRAM C. WISNER

BRIEF AND ARGUMENT FOR PETITIONER
(Applications for Prohibition and Mandamus)

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In the Supreme Court of the United States

Original Proceeding No. 23
Original Proceeding No. 24

EX PARTE ABRAM C. WISNER

BRIEF AND ARGUMENT FOR PETITIONER

(Applications for Prohibition and Mandamus)

The petitioner (A. C. Wisner), a resident of Michigan, instituted a civil action at law in which he seeks to recover $100,000 against John D. Beardsley (a resident of Louisiana), in the State Circuit Court of the City of St. Louis. A writ of attachment issued under which certain bonds were attached in the hands of the Mississippi Valley Trust Company (a Missouri corporation), located at St. Louis, and that company was summoned as garnishee. The defendant, Beardsley, being found in that city, a writ of summons was personally served upon him in St. Louis.

Before the return day of the writ of summons, and before the arrival of the date on which the garnishee was required to answer the summons of garnishment, the garnishee appeared in the State court and admitted

having in its hands certain bonds, the property of Beardsley. At the same time Beardsley appeared and filed his application to remove the case to the United States Circuit Court for the Eastern Division of the Eastern Judicial District of Missouri, within which division and district the City of St. Louis is located, and, having given the requisite bond, the State court (*ex parte*) granted the application and ordered the cause removed to the United States Circuit Court for the Eastern Division of the Eastern Judicial District of Missouri.

The petition for removal alleges (as the sole and only ground for removal) that the defendant, Beardsley, is a non-resident of the State of Missouri, that the controversy is between citizens of different States, that Beardsley is a resident of Louisiana, and that Wisner, the plaintiff (petitioner here) is a resident of Michigan.

On the first day of the next term of the said United States Court (March 19th, 1906) Beardsley entered his appearance in that court and filed therein a transcript of the record in the case, and immediately thereafter the plaintiff in the case, Wisner (petitioner here) appeared in that court (limiting his appearane specially and solely for the purposes of his motion) and moved the said United States Court to remand the case to the State court from whence it came, for the reason that the suit did not involve a controversy within the jurisdiction of said United States Court because the plaintiff, being a resident of Michigan, and the defendant, being a resident of Louisiana, the cause was not within the original jurisdiction of the said United States Court and hence it could not and did not acquire jurisdiction by removal.

The application to remand was denied, Judge Finklenburg (the District Judge holding the said United States Circuit Court) expressing in his written opinion (page 12 of the petition filed in this Court) his appreciation of the closeness of the question involved and his determination to retain the cause because of his belief (we think an erroneous belief) that if he retained the case his action might be reviewed, and, if erroneous, corrected on appeal, whereas if he remanded the cause there could be no review of his action.

Thereupon the petitioner (Wisner) declined to appear further in the cause, and, having advised Judge Finklenburg of his intention so to do, filed in this court his applications for Prohibition and Mandamus directed to the said United States Circuit Court, commanding that it take no further cognizance of the case except to remand the case to the State court from whence it came. Pending the prepartion of these applications, no further proceedings were had in the United States Court, and, in due course, these applications having been prepared and presented, a rule to show cause why the writs prayed for should not issue was granted by this Court, and acceptance of service acknowledged and filed herein.

It is in support of these applications that we submit for the consideration of the Court the following brief and argument:

I.

As to the Right of Removal.

The Circuit Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri has no jurisdiction, original or otherwise, of the suit

removed by reason of the diverse citizenship of the parties which appears from the petition for removal and the record, inasmuch as neither party is a citizen of the State or a resident or inhabitant of the district in which said court is held, and the case could not, therefore, be lawfully removed to said court from the State court, and said court of the United States could not have, and does not have, any jurisdiction whatever over it by reason of said removal, the sole ground for which was the diverse citizenship of the parties.

a. The jurisdiction of the United States Circuit Courts of suits involving controversies between citizens of different States, was (both at the time the suit involved in this application was brought in the State court, and when the removal was had), and now is, derived from and dependent on, the Act of Congress, approved August 13, 1888, and in construing this act this Court has held, and repeatedly affirmed, that the second clause of the first, or jurisdictional section of the act, which declares, "But no person shall be arrested in one district for trial in another in any civil action before a circuit or district court, and no civil suit shall be brought before either of said courts against any person by any original process or proceeding in any other district than that whereof he is an inhabitant, **but where the jurisdiction is founded only on the fact that the action is between citizens of different States, suit shall be brought only in the district of the residence of either the plaintiff or the defendant**", etc., restricts the general grant of original jurisdiction made in the first clause of that section, so that the effect is: "As to natural persons, therefore, it cannot be doubted that the effect of this act, read in the light of earlier acts upon the

same subject, and of the judicial construction thereof, is that the phrase 'district of the residence of' a person is equivalent to 'district whereof he is an inhabitant', **and cannot be construed as giving JURISDICTION, BY REASON OF CITIZENSHIP** to a Circuit Court **held in a State of which neither party is a citizen, but, on the contrary, restricts the JURISDICTION to the district in which one of the parties resides WITHIN the State of which** he is a citizen; and that this act, therefore, **having taken away the alternative,** permitted in the earlier acts—**of suing a person in the district 'in which he shall be found', requires any suit, the jurisdiction of which is founded only on its being between citizens of different States, TO BE BROUGHT IN THE STATE OF WHICH ONE IS A CITIZEN, AND IN THE DISTRICT THEREIN OF WHICH HE IS AN INHABITANT AND RESIDENT.**" In other words, the general grant of **original jurisdiction** in the first clause does not include a grant of original jurisdiction of a suit, when the jurisdiction is sought to be founded only on the fact of the diverse citizenship of the parties to the suit, where it does not appear that one of the parties to the suit is a citizen of the State and an inhabitant and resident of the district in which the Circuit Court in which it is brought is held; that is, the first clause of the act confers no original jurisdiction of the suit on the Circuit Court by reason of diverse citizenship, if neither plaintiff or defendant resides in the district, although the parties may be citizens of different States. The record shows that neither of the parties to the suit involved in this application resided in the Eastern Judicial District of Missouri, so that it could not have been maintained in

that Court if it had been brought there originally by original process.

Act August 13, 1888, 25 State at Large 433
Shaw v. Quincy Mining Co., 145 U. S. 444, 448 and 449.
McCormick v. Walthers, 134 U. S. 43 and 44;
Smith v. Lyon, 133 U. S. 319;
St. Louis Ry. v. McBride, 141 U. S. 128 and 129.

b. The second section of the Act of August 13, 1888, was (when the suit was brought and removed), and still is the law authorizing removals from the State courts to the United States Circuit Courts, and under which the suit involved in this application was removed. This section, after providing in the first clause thereof for the removal of causes of a civil nature, in law and in equity, arising under the Constitution, or laws, or treaties of the United States, of which the United States Circuit Courts are by the first clause of the first section of the act given original jurisdiction, then proceeds to provide for the removal of the remaining classes of cases of which those courts are given original jurisdiction by the first section of the act, including those where jurisdiction is founded only on diverse citizenship of the parties, as follows: "**Any other suit** of a civil nature, at law or in equity, **of which the Circuit Courts** of the United States **are given jurisdiction** by the **preceding section**," (that is, by section 1), "and which are now **pending, or** which may **hereafter** be **brought in any State court,** may be removed into the Circuit Court of the United States for the **proper district** by the **defendant or defendants therein, being non-residents of that State.**"

This Court has held, and declared it to be settled, that in order to make a suit removable under this section of the act it must be one which the plaintiff could have brought originally in the United States Circuit Court, to which it would be removed by original process.

Traction Co. v. Mining Co., 196 U. S. 245–6;
Mexican Nat. R. R. v. Davidson, 157 U. S. 208;
Cochran v. Montgomery Co., 199 U. S. 272;
Tenn. v. U. & P. Bank, 152 U. S. 454;
Metcalf v. Watertown, 128 U. S. 586;
Minn. v. Northern Securs. Co., 194 U. S. 48–63 and 64;
Boston Mining Co. v. Montana Ore Co., 188 U. S. 640;
Cates v. Allen, 149 U. S. 459 and 469;
Sweeney v. Castor Oil Co., Sup. Ct. Rep., Vol. 26, No. 5, p. 55;
So. Pac. Co. v. Denton, 146 U. S. 202;
Anderson v. Watt, 138 U. S. 701, 702;
Neel v. Penn. Co., 157 U. S. 153, 154;
Hanrick v. Hanrick, 153 U. S. 198;
Powers v. C. & O. Ry., 169 U. S. 99;
M. C. & L. M. Ry. v. Swan, 111 U. S. 379.

The latest utterance of this Court on this subject is the Cochran case (199 U. S. 260) where your Honors say:

> "The Act of 1887 restored the rule of 1789 and as we have heretofore decided, **those suits only can be removed** of which the Circuit Courts are given original jurisdiction."

We have here not only a concise and emphatic declaration of the rule by this Court in that case, but also an **interpretation of its former opinions.** It is well to note that the case of Rome v. Hughes, 130 Federal 585

(cited in Judge Finklenburg's opinion), is founded on a construction of the previous opinions of this Court, **which construction** is seemingly **repudiated** in the Cochran case, *supra*.

Again the Court says in the Cochran case:

> "To hold otherwise brings the language of the clause into conflict with **the rule** that **a suit, to be removable** must be within the **original jurisdiction** of the Circuit Court, departs from the **settled former construction,** and ignores the **main purpose** of the Act of 1887, which was to **restrict** the jurisdiction of the Circuit Court."

And again this Court says in the Cochran case:

> "The main purpose of the Act of 1887 was, as has been repeatedly held, to restrict the jurisdiction; and this was largely accomplished in the matter of removals by withholding the right from plaintiffs and **only according it to defendants when sued in plaintiff's district.** * * * It (the suit) could not have been brought in the middle district of Alabama; and **this being so** the case was **improperly removed** and should be remanded."

In Mexican National R. R. v. Davidson, 157 U. S. 201, this Court, through Chief Justice Fuller, says:

> "We must hold, therefore, as has indeed already been ruled in Tennessee v. Bank, 152 U. S. 454, 461, that the jurisdiction of the Circuit Courts **on removal** by the defendant, under this section, **is limited to such suits as might have been brought in that court by the plaintiff under the first section.**"

In Tennessee v. Bank, 152 U. S. 454, 461, Mr. Justice Gray says:

> "Section 2 allows removals from a State court to be made only by defendants, and of suits of

> which the Circuit Courts of the United States are **given jurisdiction by the preceding section**; thus limiting the jurisdiction of a Circuit Court of the United States on **removal** to such suits as might have been **brought** in that court by the plaintiff under the first section. The change is in accordance with the general policy of these acts, manifest upon their face, and often recognized by this Court, to contract the jurisdiction of the Circuit Courts of the United States."

We have purposely omitted any discussion or extended citation of cases decided by any other court, believing that all the light needed is found in the previous utterances of this Court. But the confusion resulting from the contrariety of opinion existing in the Circuit Courts and the several courts of appeal are clearly indicated by the two cases referred to in Judge Finklenburg's opinion—Rome v. Hughes, 130 Fed. 585, and Foulk v. Gray, 120 Fed. 156. The opinion in the latter case cites nearly if not all of the pertinent cases, and we beg your Honors' careful consideration of the seemingly unanswerable reasoning employed by Judge Keller in that case.

II.

The right given to the non-resident defendant or defendants by the second clause of section 2 of said act, to remove the cause from the State court to a United States Circuit Court is not absolute; it is subject to the other limitations of that clause, *i. e.*, that it must be a suit within the jurisdiction of the United States Circuit Court, and that it must be removed to the **proper district**, and, therefore, it does not authorize him or them to remove it to a United States Circuit Court held in a

district **wherein** the United States Court has **no jurisdiction of the suit removed,** or to any other judicial district beyond the State, or part of the State, which constitutes the district in which the suit is pending.

The proceeding of removal is an original indirect proceeding, whereby the suit is removed (where the removal is rightfully and lawfully made) from wholly within the jurisdiction of the State court to wholly within the jurisdiction of the United States Circuit Court to which it is so rightfully and lawfully removed. The plaintiff has not and does not appeal to the jurisdiction of any United States Circuit Court, nor has he brought his suit in a district wherein the defendant cannot be sued within the meaning of the removal act. He has not invoked the jurisdiction of the United States Court; he has not consented to the exercise of jurisdiction by that court over his person; nor has he waived his right to object to the exercise of jurisdiction over him, since he only does this when he submits himself to the jurisdiction of the United States Circuit Court by bringing his suit originally therein, or by appearing and in some way invoking the process of or consenting to the exercise of jurisdiction of that court.

In the removal proceeding under consideration, the defendant is the actor, seeking to avail himself of a right given him, or which he supposes is given him by the statute, and consequently no question of waiver of the right to be sued in a particular district arises, except that the defendant by his own act, in bringing the suit by removal before the United States Circuit Court, estops himself, and himself only, from afterwards asserting the want of jurisdiction of the court of the suit.

The plaintiff, not having submitted himself to the jurisdiction of the Circuit Court to which the case has been removed (either by bringing his suit therein or by afterwards, by any act of his, waiving the want of jurisdiction of the court in any way), is at full liberty to object to the total want of jurisdiction of the United States Circuit Court of the cause after its removal and to insist on the same.

(*a*) The proceeding of removal is an **ORIGINAL** but indirect proceeding by which **the United States Circuit Courts acquire original jurisdiction** of a cause.

"Original" means "pertaining to the beginning or origin, the first or primitive form of a thing."

Com. v. Schollinberger, 156 Pa. St. 213;
Haley v. State, 42 Neb. 561.

"Original", the first in order of time, **primary**.

Anderson's Law Dictionary, p. 739, "Original".

"Original" is from "origo".

Ibid, Note 2.

"Original."—"Primitive; first in order, bearing its own authority, and not deriving authority from an outside source, as original jurisdiction, original writ", etc.

Black's Law Dictionary, p. 857.

"Original" proceeding is defined thus: A proceeding in a civil action is an act necessary to be done in order to attain a given end. **It is a prescribed mode of action for carrying into effect a legal right.**

Rich v. Husson, 1 Duer 620.

The removal is only an indirect mode by which the Federal Court acquires **original** jurisdiction.

Virginia v. Rives, 100 U. S. 337;
Ry. Co. v. Whitton, 13 Wall. 287.

b. The proceeding for removal, as has been pointed out above, is an original indirect proceeding by which the suit was brought before the United States Circuit Court. By this proceeding on the part of the **defendant,** the cause was taken from wholly within the jurisdiction of the State court (a jurisdiction exercised under and derived from a wholly different sovereign, from that under and from which the United States Circuit Courts derive their jurisdiction), and was attempted to be brought wholly within the jurisdiction of the United States Circuit Court. If it got within the jurisdiction of the United States Circuit Court for any purpose, therefore, defendant was the actor, or instrument, by which it was done.

The defendant having himself brought the case before a Federal court where he was not liable to be sued, does not raise a question of waiver of his own right, but, as to himself, he simply submits himself thereby to the jurisdiction of such court and estops himself from afterwards contesting its jurisdiction. As to the plaintiff, the defendant merely brings him into a court which has no jurisdiction of the cause, because the case is not removable under the second section of the act, inasmuch as the jurisdiction being wholly dependent on diverse citizenship, it affirmatively appears, from the petition of removal and the record, that neither party to the suit is a citizen of the State or an inhabitant or resident of the district in

which the Circuit Court to which it is removed is held. While it is true that the defendant in doing this has waived **his** right of not being sued in **that** court, yet that does not arise from the act of the **plaintiff** in suing him in a district where he was not liable to be sued (for he was liable to suit in the State court), but arises from his own voluntary act, and choice of that tribunal, and the exercise by defendant of such right in no way estops the **plaintiff** (who has not submitted himself in any way to the jurisdiction of the court) from urging **his, the plaintiff's** right to object to being sued, for the want of jurisdiction, in the Federal Court: (1) Because the suit was not removable under the act, and (2) because that diverse citizenship is not shown which gives the court jurisdiction of the cause.

The removal act itself gives him the right to move to remand, and what is still more convincing it further makes it the duty of the Circuit Court to remand the cause.

c. Neither the right given the defendant to remove the cause in the 2nd clause of the 2nd section of the act, nor the requirement to remove it "into the Circuit Court to be held in the district where such suit is pending" is an absolute right, but is a right given solely where the other conditions of the second clause can be and are fully complied with.

In the first place by the said second clause it must be a suit of which the Circuit Court to which it is removed has jurisdiction under the first section of the act (that is, under the first clause as restricted by the second clause of said section); and as appears above, such is not the case in regard to the suit involved in this application.

In the next place clause 2 of section 2 gives the right to remove only into a court of the **"proper district"**. As shown above, this Court has held, and repeatedly affirmed the holding, that, as to natural persons, where the jurisdiction is sought to be founded only on the fact that the parties are citizens of different States, as in the case involved in these applications, the act requires the suit to be brought in the State of which one of the parties is a citizen and in the district therein of which he is an inhabitant and resident, and the act **is not to be construed as giving jurisdiction, by reason of citizenship,** to a Circuit Court, **held in a State of which neither party is a citizen, but, on the contrary, restricts the jurisdiction to the district in which one of the parties resides within the State of which he is a citizen.**

This Court has repeatedly decided that the only districts in which a defendant can be sued under the act of 1888, is that of the residence of the plaintiff, and that of the residence of the defendant;

> Smith v. Lyon, 133 U. S., *loc. cit.* 319;
> McCormick v. Walthers, 134 U. S., *loc. cit.* 44;
> Mex. Nat'l Bank v. Davidson, 157 U. S., *loc. cit.* 208;
> Shaw v. Quincy Mining Co., 145 U. S., *loc. cit.* 448-9,

and such district is, therefore, the only **"proper** district", within the meaning of the first section of the act. "Proper district" within the meaning of the second clause of the second section means either of the districts (*i. e.*, one of the districts) made "proper districts" by the first section of the act. Hence when the third section requires the petition to be **"for the re-**

moval of such suit into the Circuit Court to be held in the district where such suit is pending", it contemplates that the suit shall **be pending** in a "proper district", in which case only can it be removed as directed in the third section.

Otherwise interpreted the act would authorize a removal into a court having no power to take cognizance of it as a removed cause, and whose duty it would be under the act to remand it again to the State court, and it cannot be reasonably supposed Congress ever intended such a useless and absurd proceeding.

d. In bringing his suit plaintiff did not seek the Federal jurisdiction at all; he did not bring it in any Federal court; he did not bring it in the Federal court of any district; but brought in the State court in a jurisdiction wholly without that of the Federal courts, and wholly within that of another and different sovereign. He did not, therefore, bring his suit in a district of Federal jurisdiction within which the defendant was not liable to be sued, and hence, in bringing his suit he did not produce that situation where he had submitted himself to the jurisdiction of a court where he could not sue the defendant and had brought the defendant into that court to answer although defendant was not liable to suit therein, and where defendant when so brought in could, by objecting, oust the jurisdiction of the court, or where if he preferred (as his exemption from liability to be sued in that court was in the nature of a privilege which he could waive), he might, when so called on by plaintiff to answer in such court, waive his privilege, and thus submit himself to the jurisdiction of the court and thus give it jurisdiction of

the cause. Such a situation can only arise where plaintiff sues originally in the Federal court, and thus calls on defendant either to object to the jurisdiction or to waive the privilege he has of not being sued in that court and submitting to its jurisdiction. For this reason it does not fall within the principle of the cases which apply when the question of waiver is raised by suit being brought originally in the Federal court.

Central Trust Co. v. McGeorge, 151 U. S. (*loc. cit.*) 134;
Shaw v. Mining Co., 145 U. S. 453.

III.

Although the suit was not removable under the second section of the act, and, for that reason, the Circuit Court to which it was removed acquired no jurisdiction of it through the removal, yet, as this want of jurisdiction arose, not from something absolutely essential to vest jurisdiction, but from something in the nature of a personal privilege of the party **against whom jurisdiction is being asserted,** it can be waived.

If waived, as the Court has general jurisdiction otherwise of the suit, the jurisdiction of the Court would become complete and attach independent of the removal, but solely because **the waiver brought the cause within the jurisdiction** of the Court.

Such waiver may be effected in such a contingency, by either a general appearance, or any imparlance, answer, plea, or other act whatsoever, which recognizes that jurisdiction of the cause exists in the court.

If, therefore, after removal, the plaintiff in the case involved in this application, shall appear in the case, or recognize jurisdiction as existing in the Court over

the cause, in any of the ways mentioned above, the Court will acquire jurisdiction of the cause, by reason of its general jurisdiction thereby being completed and attaching, although he may have previously properly protested against the exercise of jurisdiction, and he will thenceforth be estopped, both in that court, and on error or appeal, from raising the question of the primary jurisdiction of the Court of the case, either on the ground of the unlawful and wrongful removal, or any other ground whatever.

Central Trust Co. v. McGeorge, 151 U. S. 134–5;
St. Louis Ry. v. McBride, 141 U. S. 131;
Wabash Ry. v. Brow, 164 U. S. 280;
In re Cooper, 143 U. S. 473;
Interior Const. Co. v. Gibney, 160 U. S. 219–20;
Texas & P. Ry. v. Saunders, 151 U. S. 109;
Martin v. B. & O. R. R., 151 U. S. 688;
French v. Hay, 22 Wall. 238;
Pollard v. Dwight, 4 Cranch 421.
So. Pac. Co. v. Denton, 146 U. S. 205, 206;
Bacon's Abrdgmt., Vol. 8 (Prohibition K), citing 2 Mod, 271, 272; Welthosen v. Ormsley, 3 Durnf. & East, 316.

IV.

As to the Remedy.

As neither party to the suit involved in this application and removed into the Circuit Court of the United States for the Eastern District of Missouri, was a citizen of the State or an inhabitant or resident of the district in which said court was held, which, being jurisdictional, must appear from the face of petition for removal (but does not; but instead it appears therefrom that the contrary was the case), the action removed was not one

which could have been originally brought in that circuit court for want of the requisite citizenship, and was, therefore, not removable under the act of 1888, and consequently the circuit court into which it was removed acquired no jurisdiction of the case by virtue of its removal, but was and is wholly without jurisdiction of the same, the plaintiff not having in any way admitted jurisdiction in the court of the case, but, as authorized by the act, has objected to the jurisdiction, by a timely motion to remand the same to the State court on account of the want of jurisdiction of the court into which it was removed to entertain the same, and it was the duty of the court into which it was removed, by the express terms of the act, to remand the same to the State court. But instead of remanding the cause as the law commanded and made it its duty to do, the court overruled the motion to remand, and thereby retained the cause in that court, assumed jurisdiction of it, which the existing law did not confer upon it, and is about to exercise jurisdiction of it, and to hold plea therein and proceed to the final determining thereof, which it is wholly without authority to do. That court then, the Circuit Court of the United States for the Eastern District of Missouri, has assumed and exercised and is continuing and about further to exercise a jurisdiction **wholly in excess of that conferred upon it,** in violation of the direct command of the law, and of the duty imposed on it by the law, and to the irreparable wrong of the plaintiff, the petitioner. Besides, if this Court do not grant relief, plaintiff must either abandon his action, or **admit** the jurisdiction of the court, by appearing therein and defending the same, and **thereby waive irrevocably** his right to insist on his objection to the

unwarranted assumption of jurisdiction and his right to have the case remanded to the State Court for trial there in that court and on error or appeal therefrom in the State Supreme Court.

And even if the waiver were not irrevocable, yet as no appeal or error lies at this stage of the case, he would be compelled to bear the expense, delay and trouble of a trial in the said Circuit Court to which it is removed to a final determination, every step in which would be an absolute nullity, and then bear the expense, delay and trouble of an appeal to this Court from that nullity, only to have this Court declare it a nullity, vacate it as such, and remand the cause to the United States Circuit Court to be by it remanded to the State Court from whence it came. A remedy by appeal or writ of error which would grant no other relief for the action of the Court complained of would be manifestly wholly inadequate, since it would not restrain the Circuit Court from retaining the cause, and assuming and exercising and continuing to assume and exercise to final judgment and appeal, the excess of jurisdiction it has assumed and exercised and is continuing to assume and exercise. In either situation, both the interest of parties, and the public interest, require that the Circuit Court should be restrained within the lawful limits of its jurisdiction now that such results may be prevented, and plaintiff may be enabled to enforce his right in the courts according to the law of the land. This can only be done through the supervisory jurisdiction of this Court through its writs of prohibition and mandamus.

a. The petition of removal, and also the record, show on their face, that the suit, involved in the applications,

is one of which the Circuit Court of the United States for the Eastern Division of the Eastern District of Missouri, to which it was removed, under the statute as interpreted by the repeated decisions of this Court, has no original jurisdiction, and that there has been no waiver of his rights by the plaintiff, and, therefore it shows an **entire and complete** want of jurisdiction in that Court of or over it; it further shows, that it has retained the cause, has assumed jurisdiction of and over it, and is exercising and intends, and is about to and will continue to exercise jurisdiction of and over the same to a final determination thereof. Thus it clearly appears that in all this it is proceeding clearly beyond and outside of its jurisdiction as conferred by law and interpreted by this Court, and that it intends to continue to do so, that is, exercising and intending to exercise jurisdiction clearly in excess of and beyond that conferred on it by law. In such case prohibition is proper.

In 2 Coke's Inst., title *Articuli Cleri*, 602, it is said:

> "Prohibitions by law are to be granted at any time to restrain a court to intermeddle with or execute anything, **which by law they ought not to hold plea of;** and they are much mistaken that maintain the contrary." * * * "And the King's courts that may award prohibitions, being informed, either by the parties themselves or by any stranger, that any court, temporal or ecclesiastical, doth hold plea of that (whereof they have not jurisdiction), may lawfully prohibit the same, as well after judgment and execution as before."

This was cited by Alderson, B., with approval, in Carter v. Southall, 3 M. & W. 126–7.

In *in re* Alix. Pet., 166 U. S. 137, this Court said: The settled rules in reference to the writ of prohibition

were thus laid down in *In re* Rice, Petitioner, 155 U. S. 396, 402:

> "Where it appears that the Court whose action is sought to be prohibited **had clearly no jurisdiction** of the cause originally, or of some collateral matter arising therein, a party who has objected to the jurisdiction at the outset, and has no other remedy, **is entitled to a writ of prohibition as a matter of right.** But when there is another legal remedy by appeal or otherwise, or when the question of the jurisdiction of the Court is doubtful, or depends on facts which are not made matter of record, or when the application is made by a stranger, the granting or refusal of the writ is discretionary. Nor is the granting of the writ obligatory when the case has gone to sentence and the want of jurisdiction does not appear upon the face of the proceedings." Citing Smith v. Whitney, 116 U. S. 167, 173.
>
> *Ex parte* Easton, 95 U. S. 77;
> *In re* Morrison, 147 U. S. 36;
> *In re* Fassett, 142 U. S. 486;
> *In re* Cooper, 143 U. S. 495;
> U. S. v. Hoffman, 4 Wall., 71 U. S. 161;
> *In re* Huguley Mfg. Co., 184 U. S. 301;
> *Ex parte* Penn, 109 U. S. 175, 176;
> Bronson v. Lacrosse Ry. Co., 1 Wal. 408;
> Fitzherbert's Natura Brevium (46*a*.) side p. 108;
> Jones v. Owens, 18 Law J. 2 Q. B. 8;
> *Ex parte* Phœnix Ins. Co., 118 U. S. 610;
> *In re* Rice, 155 U. S. 396.

As the case attempted to be removed in this instance is one where the jurisdiction is sought to be founded only on the fact of the diverse citizenship of the parties, if the plaintiff should appear in the cause and thus waive his privilege (as this Court, by the cases above cited, has held he would), then by such appearance he would bring the case within the **general** jurisdiction of the

Court under the 1st clause of section one of the act, and the Court would acquire jurisdiction of it, and his right to object to the want of jurisdiction by virtue of the removal (notwithstanding he had before such waiver objected to the Court's jurisdiction on that ground), would be absolutely gone, both in such Court and on appeal or error; consequently, through the action of the Court in wrongfully exercising the excess jurisdiction, the petitioner, not having yet waived his privilege, **must** (if the remedy now sought be not awarded to him) either abandon his action altogether, or submit himself to the **general** jurisdiction of the Court, by continuing the prosecution of the case in that court, and thus lose his right to object that the cause was not lawfully removed, and that the Court was without jurisdiction over it by virtue of such removal, both in that Court or on appeal or error. Hence, unless the exercise of the excess of jurisdiction complained of is restrained by this Court, petitioner will be remediless as against the unlawful removal and be compelled, despite his objection, to submit to a trial of the cause in a court other than that in which he is required to try his case by the law and the decisions of this Court. Consequently the case falls within the rule laid down in the above and numerous other cases decided by this Court, plaintiff not having waived his privilege, and having made timely objection to the jurisdiction, that,

> "When it appears that the Court whose action is sought to be prohibited had clearly no jurisdiction of the cause originally, * * * a party who has objected to the jurisdiction at the outset, and has no other remedy, is entitled to a writ of prohibition as a matter of right."

See cases next *supra*.

In *Ex parte* Phenix Ins. Co., 118 U. S. 625, 626, this Court says:

> "But in the present case the District Court is called upon by the petition of the owner of the vessel to first determine the question of any liability, when it has not jurisdiction of the cause of action, and then to determine whether the statute covers the case. **The case is clearly one for a writ of prohibition, as the want** of jurisdiction appears on the face of the proceedings." (Citing U. S. v. Peters, 3 Dal. 121.)
>
> *Ex parte* Penn., 109 U. S. 175, 176;
> Board v. Hammond El. Co., 198 U. S. 432.

c. The action of the Circuit Court complained of, is in direct violation of its duty as prescribed by the act in such a case, is in violation of the statute and of the authority of the United States by which it was created and from which it receives its authority.

In Minnesota v. Northern Securities Co., 194 U. S. 65 and 66, this Court says:

> "An allegation in a complaint filed in a circuit court of the United States **may**, indeed, **in a sense**, confer jurisdiction to determine whether the case is **of the class of which the Court may properly take cognizance for the PURPOSES of a final decree on the merits.** Newburyport Water Co. v. Newburyport, 193 U. S. 561, and Pacific Electric Ry. Co. v. Los Angeles, *post*, page 112, decided at present term. **But if, notwithstanding such an allegation, the Court finds, at any time, that the case does not really and substantially involve a dispute or controversy within its jurisdiction, then, by the express command of the Act of 1875, its duty is to proceed no further.** That is manifest from the 5th section of that act, which provides: 'That if, in any suit commenced in a circuit court or removed from a State court to a Circuit Court of the United States, it shall appear to the satisfaction of said

Circuit Court at any time after such suit has been brought or **removed thereto,** that such suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of said Circuit Court, or that the parties to said suit have been improperly or collusively made or joined, either as plaintiffs or defendants, for the purpose of creating a case cognizable or removable under this act, the said Circuit Court shall proceed no further, but shall dismiss said suit **or remand it to the court from which it was removed** as justice may require.' 18 Stat. 470. This provision has not been superseded by any subsequent legislation."

Neel v. Penn Co., 157 U. S. 153, 154;
Tennessee v. U. & P. Bk., 152 U. S. 461;
Colorado Co. v. Turk, 150 U. S. 138, 143;
Hanrick v. Hanrick, 153 U. S. 192, 198.

d. But even if your petitioner had a remedy by appeal or error, yet it must be an adequate remedy to bar it from a right to the writ of prohibition under the facts shown by the petition for removal and record in the suit involved in this proceeding.

In re Huguley, 184 U. S. 301;
In re Atlantic Ry. Co., 164 U. S. 633.

The remedy by appeal or error would be inadequate. The petitioner would be compelled to suffer the expense, delay and trouble of a complete trial in the Circuit Court to which the case has been removed, although every step in the proceedings and the final judgment would all be nullities, and then bear the expense, delay and trouble of an appeal to the Circuit Court of Appeals and to this court, and the only result would be to have the action of the Circuit Court reversed and the cause remanded to the State court, and the appeal would be no remedy for any such expense, delay or trouble, and the peti-

tioner would be then, with regard to enforcing his rights against the defendant, just where he is now. Besides, through the appeal or error the assumption and exercise of the excess of jurisdiction would not be prevented, though in violation of the duty of the court, the statute, and of the authority of the United States and of plaintiff's rights under the act, but only act upon the action of the court after it had been fully accomplished and completed, under circumstances where the court's action was not error or irregularity in the exercise of some jurisdiction, but simply judicial action founded upon no authority whatever. Appeal or error affording such results is not adequate, and in effect is a declaration that the courts may exercise all the excess of jurisdiction they choose, that they cannot be stopped, and all that can be done is to set aside what they do in the exercise of such jurisdiction after the exercise of it is at an end.

V.

The writ of mandamus is also a proper remedy for the assumption and exercise of excess of jurisdiction complained of in this proceeding, and more especially for causing the doing of that which it is the Court's duty to do under the circumstances by express command of the law and affording affirmative relief.

In Virginia v. Rives, 100 U. S. 323, this Court say:

> "Sect. 688 of the Revised Statutes enacts that the Supreme Court shall have power to issue * * * writs of mandamus in cases warranted by the principles and usages of law, to any courts appointed under the authority of the United States, or to persons holding office under the authority of the United States, where a State or an ambassador, or other public minister, or a consul or vice-consul,

is a party. In what case such a writ is warranted by the principles and usages of law it is not always easy to determine. Its use has been very much extended in modern times, **and now it may be said to be an established remedy to oblige inferior courts and magistrates to do that justice which they are in duty, and by virtue of their office, bound to do.** It does not lie to control judicial discretion, except when that discretion has been abused; but it is a remedy **when the case is outside of the exercise of this discretion, and outside the JURISDICTION of the court or officer to which or to whom the writ is addressed. One of its peculiar and more common uses is to restrain inferior courts and to keep them within their lawful bounds.** Bacon's Abridgment, Mandamus, Letter D; Tapping on Mandamus, 105; 3 Bl. Com. 100. This subject was discussed at length in *ex parte* Bradley (7 Wall. 364), and what was there said renders unnecessary any discussion of it now."

In *ex parte* Bradley, 7 Wall. 377, this Court say:

"The ground of our decision upon this branch of the case is, that the court below had no jurisdiction to disbar the relator for a contempt committed before another court. The contrary must be maintained before this order can be upheld and the writ of mandamus denied. No amount of judicial discretion of a Court **can supply a defect or want of jurisdiction** in the case. **The subject matter is not before it; the proceeding is** *coram non judice* **and void,**" and the writ in this case was granted.

Virginia v. Paul, 148 U. S. 123;
Gaines v. Rugg, 148 U. S. 243.
In re Delgado, 140 U. S. 590;
In re Hohorst, 150 U. S. 663, 664;
Ex parte Bradley, 7 Wal. 364.

The remedy must be an adequate remedy.

In re Atlantic City R. R., 164 U. S. 633;
Gaines v. Rugg, 148 U. S. 243, and cases cited;

In re Penn. Co., 137 U. S. 452–3.
In re Grossmayer, Pet., 177 U. S. 49;
In re Hohorst, 150 U. S. 663–4;
In re Huguley Mfg. Co., 184 U. S. 301;
Ky. v. Powers, Sup. Ct. Reptr., Vol. 26, No. II, 387.

If there is any appeal or error in such a case then it is an inadequate remedy for the same reasons above assigned why appeal or error would not in such a case as is involved in this application be an adequate remedy such as ought to prevent prohibition issuing.

If, therefore, there is any remedy by appeal or writ of error, then, as we have shown above in discussing the subject of prohibition, it is a wholly inadequate remedy.

H. S. Mecartney,
James C. Jones,
J. J. Darlington,
C. G. B. Drummond,
Counsel for Petitioner.

FILE COPY.

IN THE

Supreme Court of the United States.

Office Supreme Court U. S.
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Ex Parte ABRAM C. WISNER.

ORIGINAL PROCEEDING No. 9 Orig'l.
C. T. 190

Brief in Support of Return to Petition for Writ of Mandamus.

JOHN M. MOORE,
EDWARD C. ELIOT,
GEORGE H. WILLIAMS,
Counsel.

IN THE

Supreme Court of the United States.

Ex Parte ABRAM C. WISNER.

ORIGINAL PROCEEDING NO. 23.

The answer of Gustavus A. Finkelnburg, Judge of the District Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri, to the rule upon him to show cause why a writ of mandamus should not issue commanding him in said Court to remand to the Circuit Court of the City of St. Louis and State of Missouri the suit of Abram C. Wisner, plaintiff, vs. John D. Beardsley, defendant.

The respondent respectfully answers and certifies to the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

First: That the petitioner in said petition has cor-

rectly set out the matters appearing of record in the proceedings in the aforesaid suit of Abram C. Wisner, plaintiff, vs. John D. Beardsley, defendant.

Second: Respondent overruled the motion to remand the aforesaid case of Abram C. Wisner, plaintiff, vs. John D. Beardsley, defendant; for the reason that in the opinion of the respondent the Circuit Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri had jurisdiction of the aforesaid case of Abram C. Wisner, plaintiff, vs. John D. Beardsley, defendant, and for the reasons briefly indicated in the memorandum of decision filed in the cause.

Third: Respondent is advised that it is not necessary that he should make any further or other answer to the rule aforesaid, than is hereinabove contained, nor more specifically to any of the allegations set forth in the petition for mandamus aforesaid, and having fully answered said rule respondent prays to be hence dismissed with all proper costs.

Respondent also respectfully refers to brief of counsel filed in this Honorable Court, and the authorities referred to in support and maintenance of the ruling made by respondent.

Respondent respectfully submits to the judgment of this Honorable Court, and will enforce by order any direction given by the Court in the premises.

... .

Judge of the District Court of the United States for the Eastern District of Missouri.

IN THE

Supreme Court of the United States.

Ex Parte ABRAM C. WISNER.

ORIGINAL PROCEEDING NO. 23.

Brief in Support of Return to Petition for Writ of Mandamus.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Abram C. Wisner, a citizen and resident of Michigan, brings a civil suit in the Circuit Court of the City of St. Louis, State of Missouri, against John D. Beardsley, a citizen and resident of the State of Louisiana. The matter in dispute exceeds, exclusive of interest and costs, the sum of $2,000.

The only question now presented to this Honorable Court for decision is, whether or not such a suit is properly removable by the defendant to the Circuit

Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri.

The question depends upon the constructon of Sections 1 and 2 of the Act of March 3d, 1875, as amended by the Act of March 3d, 1887, as corrected by the Act of August 13th, 1888. The material portions of those sections are as follows:

> "Section 1. That the Circuit Courts of the United States shall have original cognizance, concurrent with the Courts of the several States of all suits of a civil nature, at common law or in equity, where the matter in dispute exceeds, exclusive of interests and costs, the sum or value of two thousand dollars, * * * in which there shall be a controversy between citizens of different States, * * * . But * * * no civil suit shall be brought before either of said Courts against any person by any original process or proceeding in any other than that whereof he is an inhabitant, but where the jurisdiction is founded only on the fact that the action is between citizens of different States, suit shall be brought only in the district of the residence of either the plaintiff or the defendant."
>
> "Sec. 2. * * * Any other suit of a civil nature, at law, or in equity, of which the Circuit Courts of the United States are given jurisdiction by the preceding section, and which are now pending, or which may hereafter be brought, in any State Court, may be removed by the defendant or defendants therein, being non-residents of that State."

Of what suits of a civil nature are the Circuit Courts of the United States "given jurisdiction by the preceding section?" The first clause of the "preceding section" gives the Circuit Courts of the United States

jurisdiction of all suits of a civil nature, involving the jurisdictional amount in value, in which there "shall be a controversy between citizens of different States." A subsequent clause of the "preceding section" provides that where jurisdiction is founded only on the fact that the action is between citizens of different States, suit shall be brought only in the district of the residence of either the plaintiff or defendant. Is the jurisdiction of the Circuit Courts of the United States conferred by the first clause of Section 1, and does the subsequent clause of said section merely limit the venue of suits, i. e., confer a special privilege on a defendant; or does the subsequent clause of Section 1 actually limit and confine the jurisdiction of the Circuit Courts? In other words, does Section 1 confer jurisdiction in such cases generally on all Circuit Courts of the United States, with a special privilege in the defendant in each particular case to be sued in either the district of his own or the plaintiff's residence, a privilege which he may claim or waive; or does Section 1, in cases where the litigants are citizens of different States, confer jurisdiction only on two Circuit Courts, viz., the Circuit Court of the District of the plaintiff's residence, and the Circuit Court of the District of the defendant's residence? If the first alternative be correct, and the jurisdiction is conferred generally on all Circuit Courts of the United States, then Section 2, by its very terms, confers the same jurisdiction upon said Circuit Courts on removal of suits from State Courts.

We respectfully submit that the latter has been the construction given to Section 1 of said Act by this Hon-

orable Court in several cases, notably the cases of McCormick Machine Company vs. Walthers, 134 U. S. 41, and Davidson vs. Railway Company, 157 U. S. 201.

In the McCormick case, after quoting the last portion of Section 1 of the Act of March 3d, 1887, the Chief Justice said:

> "The jurisdiction common to all the Circuit Courts of the United States in respect to the subject matter of the suit and the character of the parties who might sustain suits in those courts, is described in section 1, while the foregoing clause (the venue clause), relates to the district in which suit may originally be brought."

In the Davidson case, *supra*, the Court said:

> "Sec. 2, however, refers to the first part of section 1, by which the jurisdiction is conferred, and not to the clause relating to the district in which suit may be brought."

It has been frequently held by this Court that the clause of Section 1, providing that suit shall only be brought in the district of either the residence of the plaintiff or the defendant, is a special and personal privilege, enuring to the benefit of the defendant, a privilege which may be waived.

This principle was very clearly stated by Chief Justice Waite in the case of Ex Parte Schollenberger, 96 U. S. 369, in the following language:

> "The Act of Congress prescribing the place where a person may be sued is not one affecting the general jurisdiction of the courts. It is rather in the nature of a personal exemption in favor of a defendant, and it is one which he may waive."

property of the defendant. It was held that the defendant was entitled, under the Act of March 3d, 1887, Section 2, as amended by the Act of August 13th, 1888, to remove the cause into the Circuit Court of the United States, although neither plaintiff nor the defendant was a resident of Massachusetts. Justice Field, in an opinion, in which the entire Court concurred, used the following language:

> "A suit of a civil nature, at common law or in equity, where the matter in dispute exceeds the sum of $2,000, exclusive of interest and costs, and in which the controversy is between citizens of different States, is a suit of which the Circuit Courts of the United States are given original jurisdiction. There is a restriction with regard to the particular Circuit Court in which such suits must be brought, but it relates to the parties and is of such a nature that a defendant can waive it if he chooses."

The principle supporting the right of removal is very clearly stated in the opinion in Vinal vs. Continental Construction and Implement Company, 34 Fed. 299:

> "It would seem to be the reasonable meaning of the second section of the amendatory Act (the Act of '87 as amending the Act of '75), like the second section of the original Act, to permit the defendant to litigate in the Circuit Court by a removal, a suit which he could litigate there *if it was originally commenced* in a Circuit Court."

Again in that case the Court say:

> "The second section of the amendatory Act restricts the right of removal so as to confine its exercise to a defendant who is a non-resident of

the State in which he is sued in a State Court, and makes no other change in the second section of the original Act. Ambiguity has been introduced into the second section of the amendatory Act by limiting the amendatory Act to 'suits of which Circuit Courts are given jurisdiction in the preceding section.' It has been thought by some that this phrase restricts the right of removal to suits in which the particular Circuit Court to which the defendant seeks to resort has not only jurisdiction of the subject matter, but also jurisdiction over the person of the defendant. This is not a necessary, and does not seem to be a sensible, construction of the section. *That phrase was apparently used to dispense with the recapitulation of the several conditions which determine the jurisdiction of the subject matter in the first section.* The word 'jurisdiction' refers to jurisdiction over the subject matter, to the general jurisdiction of circuit courts, *and means a jurisdiction which would enable any Circuit Court to entertain and determine the controversy if the parties were before it.*"

We respectfully submit that the Circuit Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri properly overruled the motion to remand in the case of Wisner vs. Beardsley, as set forth in the present petition for a writ of mandamus, and we respectfully pray the judgment of this Honorable Court.

JOHN M. MOORE,
EDWARD C. ELIOT,
GEORGE H. WILLIAMS,
Counsel.

This language was adopted in the case of St. Louis, etc., Railway vs. McBride, 141 U. S. 131.

In the case of Central Trust Company vs. McGeorge, 151 U. S. 131, the Court said:

> "The exemption from being sued out of the district of defendant's domicile is a personal privilege which may be waived, and which is waived by pleading to the merits."

Section 2 of the Act of March 3d, 1887, in no wise provides for any election by any party in respect to removal of suits from State Courts. There can be no dispute in reference to the construction of Section 2. It provides in broad terms for removal of every suit of a civil nature "of which the Circuit Courts of the United States are given jurisdiction by the preceding section." If the position as above stated as to the general jurisdiction conferred by Section 1 upon the Circuit Courts of the United States be correct, then the suit brought by Mr. Wisner in the Circuit Court of the City of St Louis, State of Missouri, was properly removed by the defendant to the United States Circuit Court for the Eastern Division of the Eastern Judicial District of Missouri.

The counsel for the petitioner in this proceeding, if we understand them correctly, contend that, where a suit is pending in a State Court between two non-residents, such suit cannot be removed to the Circuit Court of the United States without the consent of both parties, and that the plaintiff, Wisner, has never given his consent to be sued in the United States Circuit Court for the Eastern Division of the Eastern Judicial District of Missouri. Assuming for the moment that the "personal privilege" contained in Section 1 ap-

plies to a case removed to a United States Circuit Court by virtue of Section 2, the contention of petitioner's counsel would remain unsupported. The personal privilege granted by Section 1 is granted to defendants, and not to plaintiffs. Nowhere in Section 1 is any privilege granted to any plaintiff, which could be construed to apply to a suit removed under Section 2.

As stated by Judge Simonton, in V. C. Chemical Company vs. Insurance Companies (C. C.), 108 Fed. 452:

> "The right of removal is given wholly to the defendant, without any reference in a remote degree to the plaintiff or his wishes, so no waiver on the part of the plaintiff is necessary or proper."

Furthermore, the plaintiff has himself elected in which district to bring his suit. Section 1 provides that "the Circuit Courts of the United States shall have original cognzance, *concurrent* with the Courts of the several States," of suits between citizens of different States, involving the jurisdictional amount. With this provision before him, Mr. Wisner deliberately selected the Circuit Court of the City of St. Louis, State of Missouri, in which to bring his suit, and he thereby, *ipso facto*, necessarily consented to the *concurrent* jurisdiction of the United States Circuit Court for the Eastern Division of the Eastern Judicial District of Missouri. Where a plaintiff consents to the jurisdiction of a State Court, he thereby consents to all concurrent jurisdiction of Federal Courts, provided by Federal Statute.

The question in this precise form has never been presented to this Honorable Court for decision, although other provisions of Sections 1 and 2 of the Act of March 3d, 1875, as amended, have been frequently construed. In the recent case of Cochran vs. Montgomery County, 199 U. S. 260, this Court reviewed the provisions in respect to the right to remove on account of local prejudice. On page 273 in the opinion of this Court, the following language is found:

> "The main purpose of the act of 1887 was, as has been repeatedly said, to restrict the jurisdiction, and this was largely accomplished in the matter of removals by withholding the right from plaintiffs, and only according it to defendants when sued in plaintiff's district."

This language must be construed with reference to the precise point before the Court, removal on account of local prejudice. In such cases the language of Section 2 expressly limits the right to remove to suits brought in the district of plaintiff's residence. The right to remove on acount of local prejudice is accorded by Section 2 only "where a suit is now pending, or may be hereafter brought, in any State Court, in which there is a controversy between a citizen of the State in which the suit is brought and a citizen of another State." No such limitation is found in the other provisions of Section 2.

While the question at issue has never been directly decided by this Honorable Court, it has frequently been passed upon by the Circuit Courts of the United States. These latter decisions are in conflict, and it

would serve no purpose to review them at length. The most recent case denying jurisdiction of the United States Circuit Courts, upon removal, where both parties are non-residents, is found in Foulk vs. Gray, 120 Fed. 156. In the opinion in that case Judge Kellar admits that the weight of the Federal authority is against his conclusion, but bases his decision against the right to remove upon the ground that there must be mutual consent in such a case to give the United States Circuit Court jurisdiction. We have attempted, *supra*, to show the fallacy of that position.

The two most recent Federal cases upholding the right of removal in cases where both parties are non-residents, are Rome Petroleum Company vs. Hughes, 130 Fed. 585, and Morris vs. Clark Construction Co., 140 Fed. 756, the decision in the latter case being published after the decision by Judge Finkelnberg in the present case.

This question is said by Mr. Dillon in his work on Removal of Causes, to be well settled in favor of the right of removal in a case like the present, and Judge Dillon's view is admitted by Judge Kellar in Foulk vs. Gray, *supra*, to be correct, treated as a statement derivable from the number of cases which have upheld that view, as compared with the number holding the opposite.

The only State Court decision on the question which has been brought to our attention, is the case of American Finance Company vs. Boswick, 151 Mass. 19. In that case a citizen of Pennsylvania brought an action against a citizen of New York in the State Court of Massachusetts, and sued out an attachment upon the

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IN THE

Supreme Court of the United States.

Ex Parte ABRAM C. WISNER.

0 Orig'l.

.T. 1906 ORIGINAL PROCEEDING NO. 10

Brief in Support of Return to Petition for Writ of Prohibition.

JOHN M. MOORE,
EDWARD C. ELIOT,
GEORGE H. WILLIAMS,
Counsel.

IN THE

Supreme Court of the United States.

Ex Parte ABRAM C. WISNER.

ORIGINAL PROCEEDING NO. 24.

The answer of Gustavus A. Filkenburg, Judge of the District Court of the United States for the Eastern District of Missouri to the rule upon him to show cause why a writ of prohibition should not issue against him in said Court from asserting and exercising jurisdiction over the suit of Abram C. Wisner vs. John D. Beardsley, which was removed from the Circuit Court of the City of St. Louis to the Circuit Court of the United States for the Eastern Division of the Eastern District of Missouri, or from retaining said suit in said United States Circuit Court by virtue of said removal, or from taking any steps in the said suit so removed except to remand the same.

Respondent now respectfully answers and certifies to the Honorable Supreme Court of the United States:

First: That the petitioner has correctly set out the

matters appearing of record in the proceedings in the said suit of Abram C. Wisner, plaintiff, vs. John D. Beardsley, defendant.

Second: That respondent overruled the motion to remand the aforesaid case of Abram C. Wisner, plaintiff, vs John D. Beardsley, defendant, for the reason that in the opinion of the respondent the Circuit Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri had jurisdiction of the aforesaid case of Abram C. Wisner, plaintiff, vs. John D. Beardsley, defendant, and for the reasons brefly indicated in the memorandum of decision filed in the cause.

Third: Respondent is advised that it is not necessary that he should make any further or other answer to the rule aforesaid than is hereinabove contained, and respondent respectfully submits to the judgment of the Court in the premises, and will enforce by order any direction which may be given.

Respondent also respectfully refers to the brief of counsel filed in this Honorable Court, and the authorities referred to in support and maintenance of the ruling made by respondent.

. . . . . .

Judge of the District Court of the United States for the Eastern District of Missouri.

IN THE

Supreme Court of the United States.

Ex Parte ABRAM C. WISNER.

ORIGINAL PROCEEDING NO. 24.

Brief in Support of Return to Petition for Writ of Prohibition.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Abram C. Wisner, a citizen and resident of Michigan, brings a civil suit in the Circuit Court of the City of St. Louis, State of Missouri, against John D. Beardsley, a citizen and resident of the State of Louisiana. The matter in dispute exceeds, exclusive of interest and costs, the sum of $2,000.

The only question now presented to this Honorable Court for decision is, whether or not such a suit is properly removable by the defendant to the Circuit

Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri.

The question depends upon the constructon of Sections 1 and 2 of the Act of March 3d, 1875, as amended by the Act of March 3d, 1887, as corrected by the Act of August 13th, 1888. The material portions of those sections are as follows:

> "Section 1. That the Circuit Courts of the United States shall have original cognizance, concurrent with the Courts of the several States of all suits of a civil nature, at common law or in equity, where the matter in dispute exceeds, exclusive of interests and costs, the sum or value of two thousand dollars, * * * in which there shall be a controversy between citizens of different States, * * * . But * * * no civil suit shall be brought before either of said Courts against any person by any original process or proceeding in any other than that whereof he is an inhabitant, but where the jurisdiction is founded only on the fact that the action is between citizens of different States, suit shall be brought only in the district of the residence of either the plaintiff or the defendant."
>
> "Sec. 2. * * * Any other suit of a civil nature, at law, or in equity, of which the Circuit Courts of the United States are given jurisdiction by the preceding section, and which are now pending, or which may hereafter be brought, in any State Court, may be removed by the defendant or defendants therein, being non-residents of that State."

Of what suits of a civil nature are the Circuit Courts of the United States "given jurisdiction by the preceding section?" The first clause of the "preceding section" gives the Circuit Courts of the United States

jurisdiction of all suits of a civil nature, involving the jurisdictional amount in value, in which there "shall be a controversy between citizens of different States." A subsequent clause of the "preceding section" provides that where jurisdiction is founded only on the fact that the action is between citizens of different States, suit shall be brought only in the district of the residence of either the plaintiff or defendant. Is the jurisdiction of the Circuit Courts of the United States conferred by the first clause of Section 1, and does the subsequent clause of said section merely limit the venue of suits, i. e., confer a special privilege on a defendant; or does the subsequent clause of Section 1 actually limit and confine the jurisdiction of the Circuit Courts? In other words, does Section 1 confer jurisdiction in such cases generally on all Circuit Courts of the United States, with a special privilege in the defendant in each particular case to be sued in either the district of his own or the plaintiff's residence, a privilege which he may claim or waive; or does Section 1, in cases where the litigants are citizens of different States, confer jurisdiction only on two Circuit Courts, viz., the Circuit Court of the District of the plaintiff's residence, and the Circuit Court of the District of the defendant's residence? If the first alternative be correct, and the jurisdiction is conferred generally on all Circuit Courts of the United States, then Section 2, by its very terms, confers the same jurisdiction upon said Circuit Courts on removal of suits from State Courts.

We respectfully submit that the latter has been the construction given to Section 1 of said Act by this Hon-

orable Court in several cases, notably the cases of McCormick Machine Company vs. Walthers, 134 U. S. 41, and Davidson vs. Railway Company, 157 U. S. 201.

In the McCormick case, after quoting the last portion of Section 1 of the Act of March 3d, 1887, the Chief Justice said:

> "The jurisdiction common to all the Circuit Courts of the United States in respect to the subject matter of the suit and the character of the parties who might sustain suits in those courts, is described in section 1, while the foregoing clause (the venue clause), relates to the district in which suit may originally be brought."

In the Davidson case, *supra*, the Court said:

> "Sec. 2, however, refers to the first part of section 1, by which the jurisdiction is conferred, and not to the clause relating to the district in which suit may be brought."

It has been frequently held by this Court that the clause of Section 1, providing that suit shall only be brought in the district of either the residence of the plaintiff or the defendant, is a special and personal privilege, enuring to the benefit of the defendant, a privilege which may be waived.

This principle was very clearly stated by Chief Justice Waite in the case of Ex Parte Schollenberger, 96 U S. 369, in the following language:

> "The Act of Congress prescribing the place where a person may be sued is not one affecting the general jurisdiction of the courts. It is rather in the nature of a personal exemption in favor of a defendant, and it is one which he may waive."

This language was adopted in the case of St. Louis, etc., Railway vs. McBride, 141 U. S. 131.

In the case of Central Trust Company vs. McGeorge, 151 U. S. 131, the Court said:

> "The exemption from being sued out of the district of defendant's domicile is a personal privilege which may be waived, and which is waived by pleading to the merits."

Section 2 of the Act of March 3d, 1887, in no wise provides for any election by any party in respect to removal of suits from State Courts. There can be no dispute in reference to the construction of Section 2. It provides in broad terms for removal of every suit of a civil nature "of which the Circuit Courts of the United States are given jurisdiction by the preceding section." If the position as above stated as to the general jurisdiction conferred by Section 1 upon the Circuit Courts of the United States be correct, then the suit brought by Mr. Wisner in the Circuit Court of the City of St. Louis, State of Missouri, was properly removed by the defendant to the United States Circuit Court for the Eastern Division of the Eastern Judicial District of Missouri.

The counsel for the petitioner in this proceeding, if we understand them correctly, contend that, where a suit is pending in a State Court between two non-residents, such suit cannot be removed to the Circuit Court of the United States without the consent of both parties, and that the plaintiff, Wisner, has never given his consent to be sued in the United States Circuit Court for the Eastern Division of the Eastern Judicial District of Missouri. Assuming for the moment that the "personal privilege" contained in Section 1 ap-

plies to a case removed to a United States Circuit Court by virtue of Section 2, the contention of petitioner's counsel would remain unsupported. The personal privilege granted by Section 1 is granted to defendants, and not to plaintiffs. Nowhere in Section 1 is any privilege granted to any plaintiff, which could be construed to apply to a suit removed under Section 2.

As stated by Judge Simonton, in V. C. Chemical Company vs. Insurance Companies (C. C.), 108 Fed. 452:

> "The right of removal is given wholly to the defendant, without any reference in a remote degree to the plaintiff or his wishes, so no waiver on the part of the plaintiff is necessary or proper."

Furthermore, the plaintiff has himself elected in which district to bring his suit. Section 1 provides that "the Circuit Courts of the United States shall have original cognzance, *concurrent* with the Courts of the several States," of suits between citizens of different States, involving the jurisdictional amount. With this provision before him, Mr. Wisner deliberately selected the Circuit Court of the City of St. Louis, State of Missouri, in which to bring his suit, and he thereby, *ipso facto*, necessarily consented to the *concurrent* jurisdiction of the United States Circuit Court for the Eastern Division of the Eastern Judicial District of Missouri. Where a plaintiff consents to the jurisdiction of a State Court, he thereby consents to all concurrent jurisdiction of Federal Courts, provided by Federal Statute.

The question in this precise form has never been presented to this Honorable Court for decision, although other provisions of Sections 1 and 2 of the Act of March 3d, 1875, as amended, have been frequently construed. In the recent case of Cochran vs. Montgomery County, 199 U. S. 260, this Court reviewed the provisions in respect to the right to remove on account of local prejudice. On page 273 in the opinion of this Court, the following language is found:

> "The main purpose of the act of 1887 was, as has been repeatedly said, to restrict the jurisdiction, and this was largely accomplished in the matter of removals by withholding the right from plaintiffs, and only according it to defendants when sued in plaintiff's district."

This language must be construed with reference to the precise point before the Court, removal on account of local prejudice. In such cases the language of Section 2 expressly limits the right to remove to suits brought in the district of plaintiff's residence. The right to remove on acount of local prejudice is accorded by Section 2 only "where a suit is now pending, or may be hereafter brought, in any State Court, in which there is a controversy between a citizen of the State in which the suit is brought and a citizen of another State." No such limitation is found in the other provisions of Section 2.

While the question at issue has never been directly decided by this Honorable Court, it has frequently been passed upon by the Circuit Courts of the United States. These latter decisions are in conflict, and it

would serve no purpose to review them at length. The most recent case denying jurisdiction of the United States Circuit Courts, upon removal, where both parties are non-residents, is found in Foulk vs. Gray, 120 Fed. 156. In the opinion in that case Judge Kellar admits that the weight of the Federal authority is against his conclusion, but bases his decision against the right to remove upon the ground that there must be mutual consent in such a case to give the United States Circuit Court jurisdiction. We have attempted, *supra*, to show the fallacy of that position.

The two most recent Federal cases upholding the right of removal in cases where both parties are non-residents, are Rome Petroleum Company vs. Hughes, 130 Fed. 585, and Morris vs. Clark Construction Co., 140 Fed. 756, the decision in the latter case being published after the decision by Judge Finkelnberg in the present case.

This question is said by Mr. Dillon in his work on Removal of Causes, to be well settled in favor of the right of removal in a case like the present, and Judge Dillon's view is admitted by Judge Kellar in Foulk vs. Gray, *supra*, to be correct, treated as a statement derivable from the number of cases which have upheld that view, as compared with the number holding the opposite.

The only State Court decision on the question which has been brought to our attention, is the case of American Finance Company vs. Boswick, 151 Mass. 19. In that case a citizen of Pennsylvania brought an action against a citizen of New York in the State Court of Massachusetts, and sued out an attachment upon the

property of the defendant. It was held that the defendant was entitled, under the Act of March 3d, 1887, Section 2, as amended by the Act of August 13th, 1888, to remove the cause into the Circuit Court of the United States, although neither plaintiff nor the defendant was a resident of Massachusetts. Justice Field, in an opinion, in which the entire Court concurred, used the followng language:

> "A suit of a civil nature, at common law or in equity, where the matter in dispute exceeds the sum of $2,000, exclusive of interest and costs, and in which the controversy is between citizens of different States, is a suit of which the Circuit Courts of the United States are given original jurisdiction. There is a restriction with regard to the particular Circuit Court in which such suits must be brought, but it relates to the parties and is of such a nature that a defendant can waive it if he chooses."

The principle supporting the right of removal is very clearly stated in the opinion in Vinal vs. Continental Construction and Implement Company, 34 Fed. 229:

> "It would seem to be the reasonable meaning of the second section of the amendatory Act (the Act of '87 as amending the Act of '75), like the second section of the original Act, to permit the defendant to litigate in the Circuit Court by a removal, a suit which he could litigate there *if it was originally commenced* in a Circuit Court."

Again in that case the Court say:

> "The second section of the amendatory Act restricts the right of removal so as to confine its exercise to a defendant who is a non-resident of

the State in which he is sued in a State Court, and makes no other change in the second section of the original Act. Ambiguity has been introduced into the second section of the amendatory Act by limiting the amendatory Act to 'suits of which Circuit Courts are given jurisdiction in the preceding section.' It has been thought by some that this phrase restricts the right of removal to suits in which the particular Circuit Court to which the defendant seeks to resort has not only jurisdiction of the subject matter, but also jurisdiction over the person of the defendant. This is not a necessary, and does not seem to be a sensible, construction of the section. *That phrase was apparently used to dispense with the recapitulation of the several conditions which determine the jurisdiction of the subject matter in the first section.* The word 'jurisdiction' refers to jurisdiction over the subject matter, to the general jurisdiction of circuit courts, *and means a jurisdiction which would enable any Circuit Court to entertain and determine the controversy if the parties were before it.*"

We respectfully submit that the Circuit Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri properly overruled the motion to remand in the case of Wisner vs. Beardsley, as set forth in the present petition for a writ of prohibition, and we respectfully pray the judgment of this Honorable Court.

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